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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1960

No. 741

HUNT FOODS AND INDUSTRIES, INC.,
Petitioner,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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JURISDICTION

The opinion and judgment of the Court of Appeals were dated and entered December 15, 1960 (Appendixes A and B), and a timely petition for rehearing was denied on January 20, 1961 (Appendix C). The jurisdiction of this Court is invoked under 28 USC 1254 (1).

STATUTES INVOLVED

Section 9 of the Federal Trade Commission Act, 15 USC 49, provides in pertinent part:

> "For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.
>
> Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. . . ."

* * * * * * *

"Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof . . ."

Section 6(a) of the same Act, 15 USC 46, provides in pertinent part that the Commission shall have power

"(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships."

QUESTIONS PRESENTED

(1) Does FTC have power to issue a pre-complaint investigative subpoena *duces tecum?*

(2) Is not the order made by the District Court and affirmed by the Court of Appeals an enforcement of FTC's access rather than its subpoena power and therefore invalid since the access power is enforceable only in mandamus proceedings brought by the Attorney General?

STATEMENT

FTC filed an application with the District Court for an order enforcing its subpoena (R 3-16) and obtained an Order to Show Cause (R 17-18). Petitioner opposed en-

forcement upon the grounds of lack of FTC power to issue a pre-complaint subpoena, excessive breadth of the subpoena, and other grounds. As the result of an uncontroverted affidavit filed by petitioner showing oppressiveness and burdensomeness in great factual detail (R 24-84),[1] the District Court expressed grave doubt as to the reasonableness of the subpoena (R 155-161). FTC thereafter filed with the Court an Undertaking (R 84), purporting to ameliorate compliance with the subpoena.

The District Court ordered the production of the documents covered by the subpoena (R 104-109) as modified by the Undertaking.

Petitioner appealed to the Court of Appeals, asserting (*inter alia*) the contentions presented by this Petition. The Court of Appeals affirmed the order of the District Court; and denied our petition for rehearing.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION WHETHER FTC HAS POWER TO ISSUE A PRE-COMPLAINT SUBPOENA DUCES TECUM.

The Court of Appeals' decision that FTC has power to issue a pre-complaint subpoena duces tecum raises an issue of great importance in administrative law which has not yet been but which should be settled by the Supreme Court.

There are no appellate decisions on this question and the District Court decisions which have specifically passed

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[1] The affidavit showed that the subpoena sought all records and documents relating to no less than 230,000 sales transactions and that it would take petitioner 19,724 man-days to locate and produce these documents.

upon this issue are in conflict, two decisions holding FTC lacks such power (*Miller's National Federation v FTC*, Sup. Ct. DC 1927, CCH Trade Reg Serv, Supp. VI, § 6285; *FTC v Smith*, SDNY 1929, 34 F2 323), and one decision holding to the contrary (*FTC v Waltham Watch Co.*, SDNY 1957, 169 FS 614.[2]

Concededly, under the access power conferred on it by FTC Act § 9 (15 USC § 49), FTC has a right to compel compulsory production of documents prior to filing of a complaint. The sole issue is whether FTC's pre-complaint access power is duplicated by a right of pre-complaint subpoena. The question is an important one since, as stated by *Laughlin*, Investigation and Trial of Robinson-Patman Cases Before the Federal Trade Commission (Part I) 6 A Bull. 741, 760-761, FTC itself

> ". . . has no authority to enforce a demand for access; it must certify such a matter to the Attorney General for action, whereas the Commission itself may proceed in the District Court to enforce its subpoenas."

Petitioner's right to review by the Attorney General of demands by FTC for pre-complaint access to documents is an important procedural right. As said by this Court in *FTC v Claire Furnace Co.*, 274 US 160 (1927):

> "It was intended by Congress in providing this method of enforcing the orders of the Trade Com-

[2]FTC's contention below that there has been a "long administrative practice" on its part of issuing pre-complaint subpoenas is not supported by the record. Between 1914 and 1927, when *Miller's National Federation (supra)* was decided, its only reported efforts to compel pre-complaint production of documents were cases in which it sought to exercise its access power. Following its defeat in that case and the 1929 *Smith* case, FTC did not seek to issue pre-complaint subpoenas until 1954.

> mission to impose upon the Attorney General the duty of examining the scope and propriety of the orders, and of sifting out of the mass of inquiries issued what in his judgment was pertinent and lawful before asking the Court to issue a mandamus against those whom the orders affected and who refused to comply."

A holding that FTC's subpoena power is available prior to issuance of a complaint will obviously nullify this procedural right, since FTC will in every instance be able to bypass the Attorney General by the simple semantical expedient of denominating its demand for production of documents a subpoena rather than a demand for access.

Final resolution of the much mooted pre-complaint subpoena issue will be beneficial not only to corporate respondents but also to FTC and the public, since it will spare them all from delay and litigation expense which will otherwise result from further litigation of this issue.

A brief summary of the reasons why it is contended that FTC lacks pre-complaint subpoena power follows.

1. The express language of § 9 of the FTC Act demonstrates that the subpoena power is available only in adjudicative proceedings.

The second paragraph of § 9 provides that the production of documentary evidence in response to an FTC subpoena may be required *only* at a "hearing".

This does not constitute a grant of authority to FTC to hold "hearings" but merely authorizes the use of subpoenas at hearings elsewhere provided for. The only provisions authorizing FTC hearings are FTC Act §5(b) and Clayton Act § 11, both of which provide solely for

adjudicative hearings with respect to alleged violations of these Acts. Neither FTC Act § 6 nor any other provision of the FTC Act or Clayton Act authorizes hearings in investigations under FTC Act § 6.

For this reason, as was specifically pointed out in *Miller's National Federation v. FTC, supra,* the subpoena power is available only in connection with adjudicative hearings under FTC Act § 5(b) and Clayton Act § 11. The Court in *Miller's National Federation* said:

> ". . . The attendance and testimony of witnesses and the production of documentary evidence necessarily contemplates a judicial or quasi-judicial proceeding, the formal hearing of some matter at issue between definite parties and as no such hearing or proceeding is provided for in Section 6, it is evident that the power to issue subpoenas commanding the attendance and testimony of witnesses and the production of documentary evidence has no application to that Section. Section 5 does provide for a hearing of charges made by formal complaint of the Commission against any person, partnership or corporation and authorizes the making of findings of fact and the issuance of an order to the parties cited to desist from unlawful practices. The provision of Section 9 under discussion, is therefore applicable to the quasi-judicial proceeding provided for in Section 5, but it cannot be made available for the investigations authorized by Section 6."

Furthermore, whereas FTC's subpoena power is exercisable only in connection with "hearings", its access power is exercisable "at all reasonable times". This contrasting language plainly indicates that Congress intended to differentiate between the availability of these two

powers. The subpoena power would be exercisable only in adjudicative proceedings, but no such limitation would be imposed on the exercise of the access power.

2. This Court in the 1908 Harriman case construed § 12 of the Interstate Commerce Act as authorizing subpoenas solely in adjudicative proceedings and, since FTC Act § 9's subpoena power provision was copied in 1914 from ICC Act § 12, FTC Act § 9 should be similarly construed.

FTC Act § 9's subpoena power provisions were intentionally copied *verbatim* from § 12 of the ICC Act's subpoena power provisions. [See legislative history analysis in *FTC v. Tuttle* (CA 9, 1957) 234 F2 605, 611-615.]

Shortly prior to enactment of the FTC Act, this Court construed ICC Act § 12 as authorizing subpoenas solely in adjudicative proceedings. *Harriman v. ICC* (1908) 211 US 407, 420-421. That *Harriman* so held is clear from the opinion itself (pp 420, 421):

> "That this the true view appears, we think sufficiently from the original form of § 14. That section made it the duty of the Commission 'whenever an investigation shall be made,' to make a report in writing which was to 'include the findings of fact upon which the conclusions of the Commission are based, together with its recommendations as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and the findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found': *As this applied, in terms to all investigations it is plain that at that time there was no thought of allowing witnesses to be summoned except in connection with a complaint for contraventions of the Act, such as the Commission was directed to 'investigate' by § 13, or in connection*

with an inquiry instituted by the Commission, authorized by the same section, 'in the same manner and to the same effect as though complaint had been made.'"

• • • • • • • •

"*. . . the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the quasi-judicial duties of the Commission. . . .*" [Emphasis added]

The Court of Appeals herein construed *Harriman* as not forbidding non-adjudicative proceeding subpoenas because of a statement in *Harriman* that subpoenas were proper only in connection with "complaints for violation of the act, and investigations that might have been the object of complaints". The Court of Appeals overlooked the fact that the terms "complaint" and "investigation" are used in a different manner in the ICC Act than in the FTC Act.[3] The *Harriman* excerpt quoted in the main text of this brief demonstrates that the *Harriman* language relied upon by the Court of Appeals was intended to refer only to adjudicative proceedings initiated on private complaint and adjudicative proceedings initiated by ICC on its own motion without the filing of a private complaint. Each phrase or provision in the FTC Act relied on by the Court of Appeals as demonstrating FTC power of pre-complaint subpoena was contained in the

[3] §§ 13-15 of the ICC Act use the term "investigation" to describe adjudicative proceedings, inasmuch as § 15 requires an adjudicative decision "whenever an investigation shall be made"; and § 13 authorizes two types of adjudicative investigations: (a) adjudicative investigations instituted by ICC upon the basis of a private complaint, and (b) adjudicative investigations instituted by ICC "in the same manner and to the same effect as though [such] a [private] complaint had been made".

ICC Act provisions construed by *Harriman* as not authorizing pre-complaint subpoenas.[4]

Consequently, this Court should apply the principle of statutory construction that when Congress uses the identical wording of an earlier enactment "the language must be taken to have been adopted with its encrusted meaning". *George V. Tribe Co. v. Kendall* (US Emerg CA, 1954) 210 F2 658, 662.

3. The Oklahoma Press Publishing Co. case, construing § 9 of the Fair Labor Standards Act, is not in point.

The language of Fair Labor Standards Act § 9 is so radically different from that of FTC Act § 9 that *Oklahoma Press Publishing Co.* (1946) 327 US 186, sustaining right of pre-complaint subpoena under FLS Act, is not in point. Whereas FTC Act § 9 makes the subpoena power available *only in connection with a "hearing"*, FLS Act § 9 adopts the subpoena power provisions of the FTC Act *"for the purpose of any hearing or investigation provided for in this Act."*.

Oklahoma Press recognized the significance of this difference in wording; pointing out (p 198, fn 22) that in the subpoena section in the original FLS House Bill,

> ". . . the subpoena power was given for the purpose of any 'hearing' but not for the purpose of any 'investigation' ".

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[4]Namely, (1) the phrases "for the purpose of this Act" and "relating to any matter under investigation" in FTC Act § 9 [Compare 15 USC § 49 with 49 USC § 12]; (2) the grant in FTC Act § 6 of authority to investigate the business and practices of corporations [Compare 15 USC § 46 with 49 USC § 12]; and (3) FTC Act § 5(b)'s authorization of complaint when it "shall have reason to believe" violations have occurred [Compare 15 USC § 45(b) with 49 USC § 13(1)].

II. THE QUESTION WHETHER THE COURT'S ORDER ENFORCES FTC'S ACCESS POWER RATHER THAN ITS SUBPOENA POWER.

Specification 1 of the subpoena calls for production of "all records and documents" relating to 230,000 sales transactions (R 24-84). Paragraph 4 of the Undertaking provides that:

> "Commission representatives will not examine all of the various documents covered by specification 1; but will conduct their examination of these documents by a sampling method. Sample documents to be examined will be selected by Commission representatives, without restriction, from among the entire group of documents specified."

Thus the Undertaking (which the Court's order incorporated in the subpoena) has converted the subpoena into an order requiring petitioner to submit to a compulsory file search. This order enforces the access power rather than the subpoena power, and inasmuch as the enforcement proceeding was not instituted by the Attorney General, the order is invalid.

FTC contends the Court's order was not an access order because it did not give FTC investigators the right physically to remove the documents selected by them from the files. This contention is fallacious, since the access power does not give FTC personnel authority to remove documents from files. The important point is that, no matter who performs the ministerial function of removal of documents from files, the file search required by the order will be completely controlled and directed by FTC's investigators. This, we submit, is an exercise of the access power. If the subpoena power is construed as ex-

tending to this type of roving file search, then any distinction between the nature of the access and subpoena powers is obliterated, a result which Congress could not have intended.[5]

This question has never been decided either by this Supreme Court, or by any other Federal Court. It is an important question of administrative law, and should be settled by this Court.

Respectfully submitted,

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February 1961

[5]An interpretation that the access and subpoena powers are coextensive with each other would conflict with the clear Congressional intention that these two powers be separate and distinct, demonstrated by the fact that the two powers are enforcible by different criminal sanctions (FTC Act § 10) and different civil enforcement procedures (FTC Act § 9) and derive from different provisions both in the House and Senate Trade Commission Bills (H.R. 15613, S. 4160, 63rd Cong., 2d Sess.) and the Interstate Commerce Act (4 a USC §§ 12, 20). See *FTC v. Tuttle*, CA 2 1957, 244 F 2 605, 611-615, 618; *FTC v. Hallmark*, CA 7 1959, 265 F 2 433, 438.

(Appendices A, B and C Follow.)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HUNT FOODS AND INDUSTRIES, INC.,
Appellant,

vs.

FEDERAL TRADE COMMISSION,
Appellee.

No. 16,751
Dec. 15, 1960

Appeal from the United States District Court for the Southern District of California
Central Division

Before: CHAMBERS, HAMLEY and HAMLIN, Circuit Judges

HAMLEY, Circuit Judge:

Hunt Foods and Industries, Inc., appeals from a district court order enforcing a subpoena *duces tecum* issued by the Federal Trade Commission. The district court order was issued pursuant to an opinion reported in *Federal Trade Commission v. Hunt Foods and Industries, Inc.*, 178 F.Supp. 448.

Prior to the issuance of the subpoena the Commission instituted an investigation (Federal Trade Commission File No. 5810044) to determine whether Hunt or its predecessors were violating section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C.A. § 45, or section 2(a) and 2(d) of the Clayton Act, as amended, 15 U.S.C.A. § 13(a), (d).[1]

[1]As its authority for initiating this investigation the Commission invoked sections 3, 5(a) and 6 of the Federal Trade Commission Act, as amended, 15 U.S.C.A. §§ 43, 45(a) and 46, and section 11 of the Clayton Act, as amended, 15 U.S.C.A. § 21. The precise purpose of the investigation is

". . . to determine whether Hunt Foods and Industries, Inc., or its predecessors, in connection with the offering for sale, sale and

In the course of this investigation the Commission issued and thereafter served upon Hunt by registered mail the subpoena in question. By this subpoena Hunt was directed to appear before named attorney-examiners of the Commission at Hunt's place of business in Fullerton, California, on an indicated date. The company was directed to there testify and produce certain specified books, papers and documents relating to the investigation.[2] On the return day of the subpoena Hunt appeared by its secretary accompanied by an attorney and "upon advice of counsel" advised the Commission representatives that it declined to comply with the subpoena.

Thereafter the Commission, proceeding under section 9 of the Federal Trade Commission Act, 15 U.S.C.A. § 49, filed an application in the district court for enforcement of its subpoena. On that day an order was entered by the court directing Hunt to show cause why the application should not be granted. A return

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distribution of processed tomato products, by selling such products at unreasonably low prices with the purpose or intent of eliminating competition, have violated Section 5 of the Federal Trade Commission Act, or by selling such products to different customers at discriminatory prices and by affording customers payments or compensations for facilities or services rendered in connection with the sale of such products not afforded competing purchasers on proportionally equal terms, have violated Sections 2(a) and 2(d) of the Clayton Act."

[2]Specifications 1(a), (b) and (c) of the subpoena directed that with respect to a three-year period (July 1, 1956, through June 16, 1959) and with respect to Hunt's most populous Hunt and Snider Division sales and broker districts and ten of its largest chain store customers comprising approximately two thirds of Hunt's total sales of food products, the following documents be produced:

"All records and documents (including but not limited to customer purchase orders, contracts of sale, sales, shipping and pre-billing invoices, customer claims, credit memoranda, cancelled checks or vouchers, memorandum billings, cash disbursements journals and cash receipts journals) pertaining to each transaction in which there has been a payment, allowance, credit or the giving of something of value (by way of cooperative advertising, promotional assistance, sales or shipping stimulation, settlement of customer claims or otherwise) to customers or customers of customers in connection with the sale and distribution by the company, its predecessors and subsidiaries of all brands of processed tomato products . . . ."

was made thereto and after a hearing and the filing of an "undertaking" by the Commission, to be discussed below, the order under review enforcing the subpoena was entered.

Hunt contests the district court order on several grounds. One of these is that the subpoena is invalid because the Commission is without authority to issue an investigational subpoena prior to the issuance of a complaint. No complaint has been issued in this administrative proceeding.

Under section 11 of the Clayton Act, as amended, 15 U.S.C.A. § 21, it is made the duty of the Commission to enforce compliance with various sections of that act including section 2, 15 U.S.C.A. § 13. Compliance is to be obtained by means of a complaint proceeding. The second paragraph of section 11 provides that a complaint is to be filed whenever the Commission "shall have reason to believe" that a person is or has been violating section 2 and other indicated sections.

The Commission cannot have "reason to believe" unless it is in possession of facts warranting such a belief. It thus becomes the duty of the Commission to ascertain the relevant facts. Section 3 of the Federal Trade Commission Act authorizes the Commission to "prosecute any inquiry necessary to its duties." It follows that the Commission is authorized to conduct an investigation to determine whether there is a probability that Hunt has violated sections 2(a) and (d) of the Clayton Act, as amended, 15 U.S.C.A. § 13(a), (d). This is one of the specific purposes of the instant investigation.

Under section 5(a) of the Federal Trade Commission Act, as amended, 15 U.S.C.A. § 45(a), the Commission is empowered and directed to prevent persons, partnerships or corporations (with exceptions not here material) from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. Under section 5(b) the Commission is authorized to institute complaint proceedings, but only when it "shall have reason to believe" that violations of section 5 have occurred or are occurring.

As in the case of complaint proceedings involving sections 2 and 11 of the Clayton Act, discussed above, it thus becomes the duty of the Commission to ascertain the facts. We noted above

that section 3 of the Federal Trade Commission empowers the Commission to prosecute any inquiry necessary to its duties. It follows that the Commission is authorized to conduct an investigation to determine whether Hunt has violated section 5(a) of the Federal Trade Commission Act. This is the second specific purpose of the instant investigation.

Additional investigative power is conferred under section 6(a) of the Federal Trade Commission Act, 15 U.S.C.A. § 46(a). That subsection authorizes the Commission to investigate the organization, business, conduct, practices and management of any corporation engaged in interstate commerce, with exceptions not here material, and its relation to other corporations, individuals, associations and partnerships.

Neither with regard to section 3 investigations nor section 6(a) investigations is a complaint proceeding a prerequisite. As previously indicated, the propriety of conducting an investigation prior to the filing of a complaint is to be implied from the use of the words "shall have reason to believe" in section 11 of the Clayton Act and section 5(b) of the Federal Trade Commission Act.

The first paragraph of section 9 of the Federal Trade Commission Act, 15 U.S.C.A. § 49, provides that for the purposes of that act "the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." The Commission's subpoena power under section 9 of the Federal Trade Commission Act is not limited to proceedings under that act, but also extends to proceedings under the Clayton Act. Federal Trade Commission v. Tuttle, 2 Cir., 244 F.2d 605, 610; Federal Trade Commission v. Reed, 7 Cir., 243 F.2d 308.

Hunt does not question the scope of section 3 of the Federal Trade Commission Act, as analyzed above, in authorizing precomplaint investigations. It does, however, contend that section 6(a) is ambiguous.

Section 6(a) is said to be ambiguous with respect to the inclusion of investigations of suspected antitrust violations. Such ambiguity, it is contended, arises from the fact that section 6(a)

does not make express reference to suspected antitrust violations. It also arises, we are told, because in section 6(a) such words as "investigate," "conduct" and "practices" appear in context with other words which, according to Hunt, connote investigations of a statistical and economic nature or investigations concerning business structures and routine commercial procedures.

We find no such ambiguity. An investigation of a suspected antitrust violation pertains to "the organization, business, conduct, practices and management" of a corporation, and to "its relation to other corporations and to individuals, associations and partnerships." Since the scope of the investigations described in section 6(a) is broad enough to include suspected antitrust violations, failure to make specific reference to such violations does not introduce an ambiguity in that regard. Nor does the fact that section 6(a) is also broad enough to authorize investigations of a statistical and economic nature or investigations relating to business structure and routine commercial practices render ambiguous the otherwise clear application of that section to investigations of suspected antitrust violations.

In further support of its contention that section 6(a) does not authorize investigations of suspected antitrust violations, Hunt points to subsections (c), (d) and (e) in the same section. Subsection (c) empowers the Commission to investigate compliance with existing antitrust decrees. Under subsection (d) the Commission is empowered to investigate and report the facts relating to any alleged antitrust violations when the President or either house of Congress so directs. Subsection (e) empowers the Commission upon the application of the Attorney General to investigate and make corrective recommendations for the adjustment of the business of any corporation alleged to be violating the antitrust laws. Hunt argues that under the doctrine of "*expressio unius est exclusio alterius*" this express enumeration in subsections (c), (d) and (e) of instances in which the Commission is empowered to investigate antitrust violations creates a strong inference that Congress did not intend to confer such power in subsection (a).

The rule of express mention and implied exclusion may be resorted to as an aid in the construction of a statute where there is no plainer internal evidence of congressional intent. It can

never, however, operate to override clear and contrary evidence of congressional intent. Neuberger v. Commissioner, 311 U. S. 83, 88.[3]

In our view clear evidence of contrary congressional intent is to be found in section 6 itself. Subsection (a) of section 6 is general enough to authorize investigations of possible antitrust law violations before or after a complaint has been filed. But it does not clearly include the power to investigate the measure of compliance with antitrust decrees. Subsection (c) therefore expressly confers the latter power. Subsection (a) authorizes investigations of possible antitrust violations instituted by the Commission upon its own initiative. Subsections (d) and (e) place the additional duties upon the Commission to conduct investigations upon the direction of the President or houses of Congress, or upon the application of the Attorney General.

It is therefore apparent that the purpose intended to be served by subsections (c), (d) and (e) is not to define or restrict the outer limits of investigative power with regard to the antitrust laws as embraced within subsection (a). Rather it is to extend the Commission's powers in this regard beyond those which are clearly expressed in that subsection.

We conclude that section 6(a) of the Federal Trade Commission Act is not ambiguous in the respects asserted by Hunt.

In arguing that sections 6 and 9 of the Federal Trade Commission Act authorize investigations and the issuance of subpoenas only in connection with complaint proceedings, appellants also contend that the courts have changed their position on this

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[3] In Securities Exchange Commission v. C. M. Joiner Leasing Corporation, 320 U. S. 344, 350-51, it was said:

"Some rules of statutory construction come down to us from sources that were hostile toward the legislative process itself and thought it generally wise to restrict the operation of an act to its narrowest permissible compass. However well these rules may serve at times to aid in deciphering legislative intent, they long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy."

issue since enactment of the Federal Trade Commission Act in 1914. Prior to that enactment, the argument goes, the Supreme Court had held that with certain exceptions the issuance of an administrative subpoena in a pre-complaint proceeding violated the Constitution.[4]

Hence, it is contended, when Congress enacted sections 6 and 9 of that act it did not thereby intend to authorize pre-complaint investigations and the issuance of subpoenas in connection with such investigations. Recognizing that the constitutionality of such administrative procedures has since been upheld,[5] Hunt insists that congressional intent must nevertheless be determined in the light of the law as it stood at the time the statute was enacted.

We do not believe that the Brimson and Harriman cases relied upon by Hunt establish the early constitutional principle contended for. It may be noted that the Supreme Court in deciding the Oklahoma Press Publishing Company case did not find it necessary to overrule these earlier decisions. But in any event whether in 1914 Congress believed that sections 6 and 9 could not under existing court decisions be constitutionally utilized in a pre-complaint proceeding is a matter of conjecture. Moreover, had Congress intended to freeze the application of these sections to correspond to what it may have interpreted to be the then existing concepts of its constitutional powers, it would probably have used language indicative of such a limited meaning. In our view what Congress said in sections 6 and 9 is a more reliable guide to what it intended than any guess as to its understanding of then existing decisional law.

The words of section 9 of the Federal Trade Commission Act, "... the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production [of documents] ... relating to any matter under investigation,"

[4]The two cases relied upon in this connection are Interstate Commerce Commission v. Brimson, 154 U. S. 447, decided in 1894, and Harriman v. Interstate Commerce Commission, 211 U. S. 407, decided in 1908. Hunt also refers to Ellis v. Interstate Commerce Commission, 237 U. S. 434. In our view that case is not in point, but in any event it was decided in 1915, which was after the enactment of the Federal Trade Commission Act.

[5]Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186, 214.

were taken from section 12 of the Interstate Commerce Act, as amended, 49 U.S.C.A. § 12. See Federal Trade Commission v. Tuttle, 2 Cir., 244 F.2d 605, 612. Hunt argues that in Harriman v. Interstate Commerce Commission, 211 U. S. 407, decided prior to enactment of the Federal Trade Commission Act, it was held that the subpoena powers conferred by section 12 of the Interstate Commerce Act are applicable only to adjudicative hearings and not to investigational hearings. Hence, it is argued, we should similarly limit the application of section 9 of the Federal Trade Commission Act.

The principle of statutory construction Hunt thus seeks to have the court apply is that when Congress uses the identical wording of an earlier enactment "the language must be taken to have been adopted with its encrusted meaning." George V. Tribe Co. v. Kendall, U.S.Emerg.Ct.A., 210 F.2d 658, 662.

But Harriman does not limit the applicability of section 12 of the Interstate Commerce Act in the manner contended by Hunt. The purpose of the investigation involved in Harriman was not limited to a determination of whether the Interstate Commerce Act was being violated in any respect, but was also designed to aid that Commission in recommending additional regulatory legislation. The court held that the subpoena power conferred under section 12 of that act was not broad enough to permit its use in investigations having the latter purpose. Said the court at page 419:

> ". . . the purposes of the act for which the commission may exact evidence embrace only complaints for violation of the act, and investigations by the commission upon matters that might have been made the object of complaint."

Giving application to the very principle of statutory construction which Hunt seeks to invoke in citing Harriman, the quoted language warrants the conclusion that Congress intended section 9 to be applicable in aid of investigations which may disclose matters "that might have been made the object of complaint." The instant Federal Trade Commission proceeding is such an investigation.

Hunt cites no other decision in support of its limited construction of sections 6 and 9. While there do not appear to be

any appellate decisions precisely in point, such pronouncements as have been made favor the construction for which the Commission argues. In Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186, section 9 of the Fair Labor Standards Act, 29 U.S.C.A. § 209, which incorporates by reference section 9 of the Federal Trade Commission Act, was held to apply to investigations prior to complaint. In Automatic Canteen Company of America v. Federal Trade Commission, 346 U. S. 61, 79, the court, referring to the Federal Trade Commission, speaks of the Commission's "broad power of investigation and subpoena, prior to the filing of a complaint . . . ."[6]

The Commission has issued a great many pre-complaint subpoenas in the past forty-five years, and many of them have been judicially upheld.[7] Long adminstrative practice is entitled to weight in construing statutes. Baltimore & Ohio Ry. Co. v. Jackson, 353 U. S. 325, 330.

For the reasons discussed above we hold that the Federal Trade Commission had authority to issue this investigational subpoena prior to the issuance of a complaint.

Another ground on which Hunt attacks the district court order under review is that the service of the subpoena by registered mail rather than by personal service is not authorized by law.

It is undisputed that the subpoena was transmitted by registered mail and received by Hunt. Section 5(f) of the Federal Trade Commission Act, as amended, 15 U.S.C.A. § 45(f), provides that complaints, orders "and other processes of the Commission under this section" may be served by registered mail. It has been indicated above that the Commission issued and served the subpoena in question during its conduct of an investigation authorized by section 5, one purpose of which is to determine whether

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[6]Hunt refers to this language as dictum and cites Nashville Milk Company v. Carnation Company, 7 Cir., 238 F.2d 86, 88 n.1, as authority for disregarding Supreme Court dicta.

[7]Recent examples include Federal Trade Commission v. Hallmark, Inc., 7 Cir., 265 F.2d 433; Federal Trade Commission v. Waltham Watch Company, S.D.N.Y., 169 F.Supp. 614; Federal Trade Commission v. Scientific Living, Inc., M.D.Pa., 150 F.Supp. 495.

there is reason to believe that Hunt has violated that section. The subpoena is therefore a process of the Commission under section 5, hence it may be served by registered mail.

There is no other statute bearing upon the manner of serving subpoenas in such proceedings. Nothing to the contrary appearing in the statute, however, it is reasonable to conclude that Congress did not intend to draw a distinction between sections with reference to the manner of serving subpoenas. Service by registered mail being sufficient for the purposes of investigations under section 5 of the Federal Trade Commission Act, the inference is compelling that it is also sufficient as to investigations under section 6(a) of that act and sections 2(a) and (d) of the Clayton Act.

Moreover, section 6(g) of the Federal Trade Commission Act, 15 U.S.C.A. § 46(g), gives the Commission power "to make rules and regulations for the purpose of carrying out the provisions of this act." In our opinion this rule is broad enough to authorize the Commission to provide by rule for the manner of service of process with respect to those activities and duties concerning which there is no statute expressly applicable. The Commission has done so by promulgating a rule which provides for the service of subpoenas in the same manner as set out in section 5(f). 16 C.F.R. §§ 1.35, 3.4.

We conclude that service of the subpoena in question by registered mail is authorized and valid.

The principal contention advanced by Hunt on this appeal has to do with the scope and breadth of the subpoena which the Commission served upon Hunt. Arguing in the district court that the subpoena is unreasonable and oppressive, Hunt presented the affidavit of Gilbert Karste, staff assistant to Hunt's treasurer, describing the work entailed in providing the specified documents. In this affidavit, which was not controverted, it was estimated that no less than 230,000 transactions would have to be exhaustively examined in order to ascertain what documents were to be supplied. Based on time studies, Karste estimated that the aggregate time which Hunt personnel would have to expend would be 157,789 hours, or 19,724 man days. This would involve a four-year task for twenty employees.

The district judge requested the Commission's counsel to comment upon the asserted burdensome and oppressive scope of the subpoena. The response to this request indicated that the Commission did not contemplate placing such a burden upon Hunt, and it was represented that the actual work would be minimized by the use of sampling methods. The district court thereupon gave the Commission fifteen days in which to file a memorandum outlining the Commission's views concerning the work and time required to comply with the subpoena.

Such a memorandum was thereafter filed in the form of an "undertaking" as to the manner in which the Commission would accept return on the subpoena. The relevant part of this undertaking is quoted in the margin.[5] The district court then filed an

[5] ". . . In compliance with that suggestion and by leave of the Court, the Commission makes the following undertaking:

"1. The Commission representatives receiving return will do so during ordinary business hours at the place or places where the files containing the various specified documents are located.

"2. No more than three Commission representatives will be employed at any one time for this purpose. It is understood that respondent will provide desk space for these Commission representatives.

"3. It is not contemplated that it shall be necessary for employees of respondent to perform the physical work of withdrawing the specified documents from the various files, unless respondent so elects. Commission representatives will stand ready to do this provided that respondent makes available an employee to indicate the files which contain the various specified documents.

"4. Commission representatives will not examine all of the various documents covered by specification 1, but will conduct their examination of these documents by a sampling method. Sample documents to be examined will be selected by Commission representatives, without restriction, from among the entire group of documents specified.

"5. Commission representatives will also examine the documents covered by specifications 3 and 4, or, at their option, samples of those documents.

"6. Where Commission representatives wish to retain copies of documents, they will, at the option of respondent, either accept photographic copies prepared by respondent or remove such documents temporarily to have them copied at the Commission's expense.

"7. Commission representatives will allow respondent to make and retain copies of studies, schedules, analyses or notes prepared by such representatives in the course of receiving return.

"8. Provided that Commission representatives receive the necessary assistance from respondent in locating files containing the specified

opinion which among other things discusses the scope of the subpoena. The district court therein summarized the undertaking filed by the Commission and the latter's expressed willingness to accept the undertaking as a binding limitation.

The view is expressed in the opinion of the district court that in filing the undertaking the Commission gave assurance that it would observe the protective restraints which might be imposed by courts in the conduct of administrative investigations. Because of what it regarded as the restraint and limitation evidenced by the undertaking, the district court stated that it was unnecessary to decide whether that document constituted an actual modification of the subpoena.

It is stated in the district court opinion, however, that the court would retain jurisdiction and would be available to determine any dispute as to any order of compliance to be issued. It is further recited in the opinion that "Hunt *will be protected* against any oppressive or illegal use of the subpoena power, should any be attempted." The court concluded that the scope of the subpoena "is not too broad or burdensome." Federal Trade Commission v. Hunt Foods and Industries, Inc., 178 F.Supp. 448, 452-53, 456.

In findings of fact thereafter entered the court among other things summarized the recitals of the Commission's undertaking. In its conclusions of law the court recited that the testimony and documents required by the subpoena are relevant to the Commission's investigation and that "the demands of the subpoena are not too broad or burdensome." In the order entered on the same day, which is here under review, Hunt was directed "to testify and produce books, papers and documents in accordance with the Commission's subpoena. . . ."

On this branch of the case Hunt argues that the district court order is invalid by reason of vagueness and ambiguity. This

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documents, Commission representatives will be present for no more than 760 man-hours at respondent's place or places of business for the purpose of examining the documents involved.

"9. Respondent's representatives will be free to observe Commission representatives throughout the making of the return on the subpoena."

vagueness and ambiguity, it is contended, arises from the fact that it is not possible to ascertain from that order whether (a) Hunt is obligated to produce all of the documents called for by the subpoena; or (b) whether Hunt is required to grant Commission investigators access to Hunt's files; or (c) whether Hunt has the choice of following one or the other of these courses.

On the district court's conclusions of law it is recited that the demands of the subpoena are not too broad or burdensome. This conclusion, however, is to be read in the light of the court's opinion, in which the Commission's undertaking was in effect stated to be a binding restraint and limitation upon the Commission. In substance, then, the district court has concluded that the subpoena, subject to such restraint and limitation, is not too broad or burdensome. The order of compliance is not made expressly subject to such restraint and limitation. In our opinion, however, it is subject thereto by necessary implication. Otherwise the order would provide relief not warranted by the conclusions of law as construed above.

We therefore hold that the order in question is not vague and ambiguous with respect to the production of documents called for by the subpoena. Hunt is not obligated thereunder to produce all of the documents called for in that subpoena, but only such documents of the kind referred to therein which may be called for by the Commission within the ambit of the binding undertaking which it has filed.

With regard to the matter of access to Hunt's files the order itself is silent. It provides only that Hunt must testify and produce books, papers and documents in accordance with the subpoena. The subpoena makes no reference to access. It has been held above, however, that the order is to be construed in the light of the conclusions of law. The conclusions of law, as we interpret them, recite that the demands of the subpoena are not too broad or burdensome if compliance is restrained and limited as provided in the undertaking. Thus, if the undertaking were to be interpreted as providing that, as an alternative to producing all books, papers and documents described in the subpoena, Hunt must grant the Commission access to Hunt's files, then the order would have to be construed as granting such access.

In contending that the undertaking contains such a provision Hunt points to paragraphs 1, 3 and 4 thereof. See footnote 8. Hunt also refers to certain statements made by counsel for the Commission during argument in the district court.[9]

Paragraph 1 of the undertaking provides only that the subpoena is returnable at the place where the records are kept. This is not unusual procedure.[10] Paragraph 3 only manifests the Commission's willingness to physically withdraw documents from the company's files, if the latter so elects. Paragraph 4 provides only that the Commission will use sampling methods and that it will for this purpose designate the documents it desires Hunt to produce for examination. We do not believe that the statements of counsel made during oral argument were intended to claim a right of access as distinguished from a willingness to go to the files if Hunt consents.

We conclude that the order under review is not vague and ambiguous with respect to the right of access, and hold that such order, as the Commission concedes, grants no power of access to Hunt's files.

In view of the construction we have placed upon the order, it is unnecessary for us to determine whether the subpoena, unaffected by the filed undertaking, would be invalid because of its scope. Hunt does not contend that, as limited by the undertaking, the scope of the subpoena is nevertheless unreasonably broad and burdensome. Nor need we decide the further question raised by Hunt as to whether the proper procedure has been followed in seeking an order granting access to Hunt's files, since the order does not grant access.

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[9]During this argument counsel said:

"Of course, in connection with this investigation we must feel free to go to all of these papers—we must be free to go to all of these papers relating to any transaction.

". . . If the place where specific records are kept is indicated to Mr. Elliott [FTC investigator], he and his assistants will go in and select as many of those records as they need . . . .

"The proposal . . . is that all of the documents will be physically available and will be selected by our examiner."

[10]See Westside Ford, Inc. v. United States, 9 Cir., 206 F.2d 627, 630; Walling v. American Rolbal Corporation, 2 Cir., 135 F.2d 1003, 1005.

The order is affirmed, it being understood that the district court retains jurisdiction to determine any dispute as to the meaning of that order or the manner of compliance therewith not settled by this opinion.

(Endorsed) Opinion Filed Dec. 15, 1960.
Frank H. Schmid, Clerk.

Appendix B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Hunt Foods and Industries, Inc., Appellant, vs. Federal Trade Commission, Appellee.	No. 16,751

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment Filed and entered: December 15, 1960.

Frank H. Schmid, Clerk.

Appendix C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Hunt Foods and Industries, Inc., Appellant, vs. Federal Trade Commission, Appellee.	ORDER No. 16,751

On Petition for Rehearing

Before: CHAMBERS, HAMLEY and HAMLIN, Circuit Judges

The opinion herein, filed on December 15, 1960, is amended by deleting the last paragraph on page 14 of the printed slip opinion and substituting in lieu thereof the following:

"We do not believe that the subpoena, as limited by the undertaking and absent any right of access, is invalid because of its scope. It is unnecessary for us to determine whether the subpoena, unaffected by the filed undertaking, would be unreasonably broad and burdensome. Nor need we decide the further question raised by Hunt as to whether the proper procedure has been followed in seek-

ing an order granting access to Hunt's files, since the order does not grant access."

The petition for rehearing is denied.

/s/ Richard H. Chambers
/s/ Frederick G. Hamley
/s/ O. D. Hamlin
Circuit Judges

(Endorsed) Filed January 20, 1961.
Frank H. Schmid, Clerk.

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FILED
MAR 22 1961
JAMES R. BROWNING, Clerk

No. 741

In the Supreme Court of the United States

OCTOBER TERM, 1960

HUNT FOODS AND INDUSTRIES, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. i–xv, xvii–xviii) has not yet been reported. The opinion of the district court (R. 87–104) is reported at 178 F. Supp. 448.

JURISDICTION

The judgment of the court of appeals was entered on December 15, 1960 (Pet. xvi). A petition for rehearing was denied on January 20, 1961 (Pet. xviii). The petition for a writ of certiorari was filed on February 17, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Section 9 of the Federal Trade Commission Act, 38 Stat. 722, as amended, 15 U.S.C. 49, provides in pertinent part:

For the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence * * *

* * * * *

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

* * * * *

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission has the power to issue a subpoena *duces tecum* during an

investigation of possible violations of the Federal Trade Commission and the Robinson-Patman Acts, where no complaint has been filed.

2. Whether a district court order enforcing such subpoena is converted into an order granting the Commission access to the company's files because the Commission has agreed, in order to lessen the company's burden in complying, to accept samples of the various categories of documents, to be selected by the Commission, and, if the company so requests, to be physically removed from the company's files by Commission employees.

STATEMENT

Petitioner is a major processor and distributor of canned fruits and vegetables, operating throughout the United States and in 72 foreign countries (R. 27–28). Since early 1958 the Federal Trade Commission has been conducting an investigation to determine whether petitioner has violated Section 5 of the Federal Trade Commission Act by selling its products at unreasonably low prices in order to eliminate competition, and whether petitioner has violated the Robinson-Patman Act by engaging in price discrimination and by failing to give its customers proportionately equal allowances for facilities and services supplied (R. 10, 25–27).

In the course of its investigation, the Commission served upon petitioner a subpoena *duces tecum* requiring it to appear at its principal place of business in California and to produce certain specified books, papers, and documents (R. 9–14). On the return

date of the subpoena, petitioner appeared but refused to comply (R. 16). The Commission then filed in the United States District Court for the Southern District of California an application under Section 9 of the Federal Trade Commission Act for enforcement of the subpoena. A show-cause order was issued (R. 17–18), and petitioner filed a reply (R. 18–84) resisting enforcement on numerous grounds, most of which have now been abandoned.

During the hearing on the show-cause order, Commission counsel responded to petitioner's allegations that the subpoena imposed unreasonable burdens by suggesting certain methods of compliance (R. 113–165). At the suggestion of the court (R. 160), these proposals were embodied in a so-called undertaking filed with the court (R. 84–86). In substance, the Commission agreed that it would not insist on production of all the documents, but would examine samples thereof; that it would accept return of the subpoena during business hours at the usual location of the records; that petitioner could request Commission representatives to perform the physical task of removing documents from the files and copying them, and that petitioner would be required only to locate the files containing the specified documents; that the Commission would bear the expense of copying; that petitioner would be allowed to observe all actions of the Commission representatives; and that not more than 760 man-hours would be spent by the Commission in examining the documents.

The district court issued an opinion overruling petitioner's objections to the subpoena and conclud-

ing that the Commission was entitled to enforcement (R. 87–104), and, on December 15, 1959, filed its findings of fact, conclusions of law, and enforcement order (R. 104–109). The Court of Appeals for the Ninth Circuit unanimously affirmed (Pet. i–xv). It held that under the Federal Trade Commission Act the Commission "had authority to issue this investigational subpoena prior to the issuance of a complaint" (Pet. ix), and that the method of compliance set forth in the undertaking filed with the district court "grants no power of access to Hunt's files" (Pet. xiv).

ARGUMENT

1. The correctness of the ruling below that the Federal Trade Commission has power to issue a pre-complaint subpoena *duces tecum* presents no novel or substantial question warranting consideration by this Court. Section 9 of the Federal Trade Commission Act, 15 U.S.C. 49, broadly grants the Commission "power to require by subpoena * * * the production of all * * * documentary evidence relating to any matter under investigation," and the lower courts have consistently ordered compliance with investigative subpoenas where no complaint had been filed.[1] In *Federal Trade Commission* v. *Waltham Watch Co.*, 169 F. Supp. 614 (S.D.N.Y.), the Commission's au-

[1] Petitioner relies (Pet. 5, 7) on a 1927 decision in *Millers' National Federation* v. *Federal Trade Commission* (Sup. Ct. D.C.) as authority for the proposition that the Commission cannot use its subpoena power in a pre-complaint investigation. That decision, however, was rendered by the court in granting a temporary injunction against enforcement of a Commission subpoena. When the same court subsequently entered a perma-

thority to issue such a subpoena was sustained. See, also, *Federal Trade Commission* v. *Smith*, 34 F. 2d 323, 325 (S.D.N.Y.), where the court, although denying enforcement of a pre-complaint subpoena because the relevancy of the subpoenaed documents had not been established, indicated that the Commission's subpoena power is exercisable in "an 'investigation' which has not ripened into a proceeding under section 5 of the act". In addition, there have been numerous cases in which the courts have enforced pre-complaint subpoenas without any apparent question as to the Commission's authority. *E.g., Federal Trade Commission* v. *Hallmark, Inc.*, 265 F. 2d 433 (C.A. 7); *Federal Trade Commission* v. *Scientific Living*, 150 F. Supp. 495 (M.D. Pa.), affirmed, 254 F. 2d 598 (C.A. 3), certiorari denied, 358 U.S. 867. Indeed, this Court has specifically noted the Commission's "broad power of investigation and subpoena, prior to the filing of a complaint". *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 79. See, also, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 197–201.

Petitioner's reliance (Pet. 8–10) on *Harriman* v. *Interstate Commerce Commission*, 211 U.S. 407, is misplaced. As the court of appeals pointed out (Pet. viii), this Court in *Harriman* recognized the propriety of investigative subpoenas "where the investigations concern a specific breach of the law * * * [and relate to] matters that might have been the

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object of a complaint" (211 U.S. at 420). See, also, the *Automatic Canteen* case, *supra*. Nor is petitioner aided by its contention (Pet. 9) that, since Congress allegedly ascribed a different meaning to the term "investigation" in the Federal Trade Commission Act than it did in the Interstate Commerce Act, the quoted language in *Harriman* is inapplicable. For if this were the case, the meaning of the term in the subpoena provisions of the latter statute could hardly control the scope of the term in the statute involved here.

2. Besides the power of subpoena, Section 9 of the Federal Trade Commission Act also gives the Commission a right of "access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against." Access orders are enforced by mandamus proceedings brought in the district courts by the Attorney General. Petitioner argues (Pet. 11-12) that the Commission's undertaking to examine only samples of the subpoenaed documents, which Commission employees would physically remove from petitioner's files if petitioner so requested, converts its demand into an "access order" enforceable only by the Attorney General. But the agreed method of compliance with the subpoena relates only to the "group of documents specified" in the subpoena, and does not grant the Commission any general access to petitioner's files. Furthermore, the Commission employees will remove the documents from petitioner's files only at the latter's request, and this procedure is obviously designed solely to make petitioner's com-

thority to issue such a subpoena was sustained. See, also, *Federal Trade Commission* v. *Smith*, 34 F. 2d 323, 325 (S.D.N.Y.), where the court, although denying enforcement of a pre-complaint subpoena because the relevancy of the subpoenaed documents had not been established, indicated that the Commission's subpoena power is exercisable in "an 'investigation' which has not ripened into a proceeding under section 5 of the act". In addition, there have been numerous cases in which the courts have enforced pre-complaint subpoenas without any apparent question as to the Commission's authority. *E.g., Federal Trade Commission* v. *Hallmark, Inc.*, 265 F. 2d 433 (C.A. 7); *Federal Trade Commission* v. *Scientific Living*, 150 F. Supp. 495 (M.D. Pa.), affirmed, 254 F. 2d 598 (C.A. 3), certiorari denied, 358 U.S. 867. Indeed, this Court has specifically noted the Commission's "broad power of investigation and subpoena, prior to the filing of a complaint". *Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 79. See, also, *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 197–201.

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pliance less burdensome. Under these circumstances, the court of appeals properly held that there was no need to decide "whether the proper procedure has been followed in seeking an order granting access to Hunt's files, since the order does not grant access" (Pet. xiv).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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